

CUTS Submission to the Department of Telecommunication on the Need for a New Legal Framework Governing Telecommunication in India

1. Background

Consumer Unity & Trust Society (CUTS) expresses its gratitude to the Department of Telecommunications (DoT), for releasing a Consultation Paper on the ‘Need for a New Legal Framework Governing Telecommunication in India’^{1,2}

2. About CUTS

In its 39 years of existence, CUTS has come a long way from being a grassroots consumer centric organisation based in Jaipur,³ to opening overseas Resource Centres in Vietnam,⁴ Africa,⁵ Switzerland,⁶ and most recently in the United States of America.⁷ It continues to remain an independent, nonpartisan, and non-profit economic policy think tank, while opening various programme centres, namely: Centre for International Trade, Economics & Environment (CITEE);⁸ Centre for Consumer Action, Research & Training (CART);⁹ Centre for Human Development (CHD);¹⁰ and Centre for Competition, Investment & Economic Regulation (CCIER).¹¹

CUTS has been working towards enhancing the regulatory environment through evidence-backed policy and governance-related interventions across various sectors and national boundaries. It has conducted various studies and events, pertaining to the telecom sector, such as Demystifying Reality from Myth for 5G in India,¹² Coding and Enforcing Mobile Internet Quality of Standards in India,¹³ Consumer Broadband Labels for Greater Transparency & Informed Consumers,¹⁴ Towards Effective Choice: A Nation-Wide Survey of Indian TV Consumers,¹⁵ among many others. Based on such evidence-based studies, CUTS is pleased to

¹ Consultation Paper available at: <https://dot.gov.in/sites/default/files/Consultation%20Paper%20final%2023072022-1.pdf?download=1>

² Press Release inviting comments, available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1845920>

³ CUTS International website: <https://cuts-international.org/>

⁴ CUTS Hanoi Research Centre website: <https://cuts-hrc.org/>

⁵ CUTS Africa Resource Centres – Nairobi website: <https://cuts-nairobi.org/>; Accra website: <https://cuts-accra.org/>; and Lusaka website: <https://cuts-lusaka.org/>

⁶ CUTS Geneva Resource Centre website: <https://www.cuts-geneva.org/>

⁷ CUTS Washington Resource Centre website: <https://cuts-wdc.org/>

⁸ CUTS CITEE website: <https://cuts-citee.org/>

⁹ CUTS CART website: <https://cuts-cart.org/>

¹⁰ CUTS CHD website: <https://cuts-chd.org/>

¹¹ CUTS CCIER website: <https://cuts-ccier.org/>

¹² Report: <https://cuts-ccier.org/pdf/research-report-5g-in-india-demystifying-reality-from-myth.pdf>

¹³ Details: <https://cuts-ccier.org/coding-and-enforcing-mobile-internet-quality-of-standards-in-india/>

¹⁴ Details: <https://cuts-ccier.org/project-launch-meeting-consumer-broadband-labels-for-greater-transparency-informed-consumers/>

¹⁵ Available at: <http://cuts-ccier.org/pdf/research-report-towards-effective-choice-a-nation-wide-survey-of-indian-tv-consumers.pdf>

submit its comments on the Consultation Paper, which have been discussed in subsequent sections.

3. CUTS Submission

The submission has been split into two parts. The first highlights broader issues/recommendations, while the second provides specific comments on issues which have been covered in the paper.

3.1 Broad issues

The Consultation Paper is brought out at an opportune time, as India looks to become a global leader in the telecommunications space. Telecommunications form the basis of digital services. The Consultation Paper rightly highlights that a *universal, resilient, secure, accessible, and affordable telecommunication* network is necessary for making India inclusive. While the paper lays down specific issues, CUTS has observed key broad issues which are laid out below along with recommendations.

- *Conduct Cost-Benefit Analysis (CBA)*

The new law is rightly expected to be attuned to the realities of the telecom sector, which helps in realising the full potential of telecom in India.¹⁶ In order to realise this goal, it becomes necessary to conduct a Regulatory Impact Assessment (RIA) through mechanisms like Cost-Benefit Analysis (CBA) before enacting the new law.¹⁷ To this end, it would be essential identify the problem statement or objective which the intended legislation intends to address/achieve.

Regulatory instruments have widespread impacts, and affect multiple stakeholder groups in different ways. Sub-optimal regulations have the potential to impose unintended cost of administration and compliance, leading to adverse outcomes, thereby reducing the likelihood of achievement of its objectives. It is therefore important to understand the impacts of any proposed regulation, to achieve favourable outcomes.

RIA is a process of systematically identifying and assessing direct and indirect impacts of regulatory proposals using consistent analytical methods. It involves a participatory approach via public consultation to assess such impact, determination of costs and benefits, and selecting the most appropriate regulatory proposal. It also helps in putting checks and balances on the government, while exercising its exclusive privilege to do things necessary in the context of telecommunication.

It is therefore recommended that the government engages with organisations experienced in conducting RIA, before finalising provisions of the new law. Conducting adequate stakeholder consultations would also be useful, in this regard.

- *Focus on follow-up action*

¹⁶ Paragraph 6 of the Consultation Paper.

¹⁷ Details of RIA are available at: <https://cuts-ccier.org/regulatory-impact-assessment/>

Efforts have been made previously as well, for having a consolidated telecom law. In 2001, based on the recommendations of an expert committee, the government had introduced the Communications Convergence Bill, 2001, with a similar objective of consolidating prevailing telecom laws.¹⁸ However, the bill did not see the light of day, and lapsed.¹⁹ Again in 2014, the government was believed to be working on the Communications Convergence Bill, 2014, with the same objective.²⁰ However, there was no forward movement on it.²¹ Accordingly, it is recommended that the government focuses on putting its plan into action this time.

- *Ensure Coherence with NDCP'18*

A lot has changed in India, in the sphere of telecom and digital technology, since the last time deliberations were held on consolidating laws pertaining to the sector. Accordingly, a good starting point of reference for revamping laws would be the National Digital Communication Policy 2018 (NDCP'18).²² Though it comes with its own shortcomings,²³ there is a need to frame laws which enable achieving the vision of NDCP'18, with respect to the following, among others: Explore setting up a national fibre authority, and accord optic fibre cables the status of public utility; Accord telecom infrastructure the status of critical and essential infrastructure; Channelise the Universal Service Obligation Fund (USOF) for ensuring inclusion of uncovered areas and digitally deprived segments of society; and Incentivise manufacturing in India, and contribution to GVCs.

3.2 Issues Covered

With respect to specific issues highlighted in the Consultation Paper, CUTS makes the following specific recommendations.

- *Consolidate Existing Laws (Para 7)*

Multiple laws including Indian Telegraph Act, 1885, Wireless Telegraphy Act, 1933 and Telegraph Wires (Unlawful Possession) Act, 1950 constitute the legal framework for governing the telecommunication sector. Adding to these, a number of other laws like the

¹⁸ The Communications Convergence Bill: India's Tryst with Destiny, Mondaq, available at: <https://www.mondaq.com/india/broadcasting-film-tv-radio/16955/the-communications-convergence-bill-indias-tryst-with-destiny>

¹⁹ Monitoring the New Communication Space, The Hindu Business Line, available at: <https://www.thehindubusinessline.com/opinion/monitoring-the-new-communication-space/article31916690.ece>

²⁰ Communications Convergence Bill, 2014, available at: <https://www.psalegal.com/wp-content/uploads/2021/12/Communications-Convergence-Bill-2014-Bill.pdf>

²¹ Convergence: An idea whose time has come? Factor Daily, available at: <https://archive.factorindia.com/is-convergence-an-idea-whose-time-has-come-in-india/>

²² National Digital Communications Policy 2018, available at: <https://dot.gov.in/sites/default/files/Final%20NDCP-2018.pdf?download=1>

²³ CUTS' Comments on the draft National Digital Communications Policy 2018, available at: https://cuts-cicr.org/pdf/CUTS_Comments_on_Draft_National_Digital_Communication_Policy2018.pdf

Telecom Regulatory Authority of India Act, 1997, rules and regulations over the past many decades have led to a complex regulatory structure.²⁴

While assessing whether provisions in the telecom related laws should be retained or not, a three-step test of legitimacy, necessity, and proportionality may be adopted.²⁵ Herein, any regulation must pass the following three tests to be retained.

- *Test of Legitimacy*: If any provision is not legitimate, it should be scrapped. If yes, the next test of necessity should be applied.
- *Test of Necessity*: If the provision passes the test of legitimacy, the test of necessity should be applied to check if the provision is necessary. If not, the provision should be scrapped. If yes, the next test of proportionality should be applied.
- *Test of Proportionality*: If the provision passes both the tests of legitimacy and necessity, it should be checked if the provision is proportional to the objective sought to be achieved. If not, the provision should be amended. If yes, the provision should be retained.

Further, while consolidation of existing laws is necessary and may lead to simplification, there is also a need to identify specific objectives that the law will seek to achieve.

One of the reasons for the survival of the Indian Telegraph Act for more than 135 years is that it was confined to mandated and disallowed actions and outcomes.²⁶ While many new technologies such as 5G and 6G, Internet of Things etc. are coming up, technology evolution is a continuous process. In this context, the new legal framework should be designed in such a manner that it can foster innovations, manage risks, empower consumers, ensure transparency, accountability, access, inclusion and good quality of services, among other things. Accordingly, for making a future ready and enabling legal framework, there is merit in making the law technology neutral by adopting a principles-based approach.

Further, today, the telecom sector has become integrated with the digital sector. Newer technology use cases like tele-healthcare, among others will be impacted by telecom as well as other sectors.²⁷ There are talks of a revised data protection and privacy law,²⁸ as well as a law for replacing the Information Technology Act, 2000.²⁹ Therefore, scope of consolidation of telecom laws, and harmonisation with other laws would need to be thought through clearly. Thus, the DoT should engage with other relevant government ministries and departments such as the Ministry of Electronics and Information Technology (MeitY).

²⁴ Less litigation, easy norms in next phase of telecom reform, Livemint, available at: <https://www.livemint.com/industry/telecom/less-litigation-easy-norms-in-next-phase-of-telecom-reform-11640284113825.html>

²⁵ Policy Study on Doing Business in Rajasthan, CUTS International, available at: <https://cuts-ccier.org/pdf/cuts-project-on-eodb-final-report.pdf>

²⁶ Digital regulation: Main challenges and how India can deal with them, The Economic Times, available at: <https://economictimes.indiatimes.com/opinion/et-commentary/digital-regulation-main-challenges-and-how-india-can-deal-with-them/articleshow/93508018.cms>

²⁷ Cross-sectoral regulatory cooperation emerges as a requirement in New Telecom, The Economic Times, available at: <https://economictimes.indiatimes.com/opinion/et-commentary/cross-sectoral-regulatory-cooperation-emerges-as-a-requirement-in-new-telecom/articleshow/93306529.cms>

²⁸ Govt withdraws Data Protection Bill, 2021, will present new legislation, Business Standard, available at: https://www.business-standard.com/article/economy-policy/centre-withdraws-personal-data-protection-bill-2019-to-present-new-bill-122080301226_1.html

²⁹ New IT Act may bring in deliberate misinformation, doxxing as offences, Business Standard, available at: https://www.business-standard.com/article/economy-policy/new-it-act-may-bring-in-deliberate-misinformation-doxxing-as-offences-122071400356_1.html

Moreover, consolidation of existing laws should also help in harmonisation between the market regulator, the Competition Commission of India (CCI) and sector regulator, the Telecom Regulatory Authority of India (TRAI), as well as other upcoming cross-sectoral regulators like the regulator for data protection such as the erstwhile proposed Data Protection Authority (DPA) in the now withdrawn Data Protection Bill, 2021. The law should also have provision of mandatory consultation with sector neutral regulator including the competition regulator, CCI. This will promote coordination and cooperation between these regulators and thus, help the industry grow.

- *Putting Consumers First (Para 8)*

The paper has rightly recognised the need for improving the comprehensibility of laws for citizens, by simplifying laws. Steps to be taken in this regard not only include drafting simple and easy to understand laws (through summaries, multilingual translations, examples etc.), but raising awareness about the laws as well. This can be done by undertaking different state level initiatives, in partnership with credible consumer organisations.

The role of consumer organisations is also important for providing effective and timely grievance redress to consumers. A good practice worth adopting in this regard pertains to supporting Consumer Support Centres, commonly known as *GrahaK Sewa/ Suvidha/ Sahayata Kendras* (GSK). A quick overview of the quarterly analysis of consumer grievances received by CUTS GSK in Rajasthan reveals that a substantial number of grievances pertain to the telecom sector.³⁰

Accordingly, the consolidated framework may incorporate appropriate provisions in this regard. Furthermore, it would be useful to appoint credible consumer organisations as advisory bodies to government departments and regulators. Providing consumers with Alternate Dispute Resolution (ADR) mechanisms on lines of Reserve Bank of India's (RBI) Ombudsman for Digital Transactions (ODT),³¹ would also help in enabling greater transparency and increased accountability, both from the government and the industry.

There is also a need for focussing on enabling effective consumer choice, while choosing different telecom and internet services. It has often been the case that consumers are not fully aware about, or capacitated to understand the details/ specifications of their subscriptions. Mandating service providers to provide consumer broadband labels, which can provide key details of the service offering in an easy infographic format, becomes useful in this regard.³² This becomes more important in light of upcoming next generation mobile communication technologies – 5G and 6G, which are set to unlock novel use cases of telecom services.

Similar issues can also be seen in the TV market, wherein studies have shown that consumers are unable to exercise choice in subscribing to channels they want to watch, and instead end up subscribing to channels which they do not want to watch, due to lack of awareness and capacity constraints. Consumers have also claimed to be dissatisfied with the quality of TV service, and being excessively reliant on last mile service providers. With the TRAI expected to revisit

³⁰ Consumer Support Centre (GrahaK Sahayta Kendra), available at: <https://cuts-cart.org/consumer-support-centre-grahak-sahayta-kendra/>

³¹ RBI launches Ombudsman Scheme for digital payments, available at: <https://www.thehindubusinessline.com/money-and-banking/rbi-launches-ombudsman-scheme-for-digital-payments/article26140915.ece>

³² Consumer Broadband Labels for Greater Transparency & Informed Consumers, CUTS International, available at: <https://cuts-ccier.org/project-launch-meeting-consumer-broadband-labels-for-greater-transparency-informed-consumers/>

regulations in this regard, it becomes important for the regulator to consider a consumer perspective, and engage with credible consumer organisations while framing regulations.³³

- *Simplifying Regulatory Framework, Ensure Regulatory Certainty and Promoting Investments (Para 9 - 13)*

India seeks to become a global leader in research, development and manufacturing of telecom technology. For this purpose, the regulatory framework needs to ensure regulatory certainty, transparency and accountability. As mentioned previously, establishing a principles based legal framework is necessary. This will allow the market and telcos to be broadly aware about the principles with which the government will regulate the telecom sector, thus providing regulatory certainty. This can promote private sector investments.

Currently, Indian network equipment manufacturers are unable to penetrate the market. There needs to be an active engagement between different stakeholders in the private sector such as telcos and network equipment manufacturers, among others. This may be promoted by the government as it will help the different stakeholders understand each other's requirements.

Further, in case of regulatory uncertainty regarding new innovations, provisions for experimenting with regulatory sandbox, regtech, suptech,³⁴ and co-regulatory approach involving not only industry but experts, and consumer organisations may be adopted. Furthermore, the new legal framework should ensure not to place any regulatory entry barriers, for newer telcos and other relevant industry players.

- *Legal Framework for Spectrum Management (Paras 14-17)*

Procurement of license for spectrum is governed by Section 4 of the Indian Telegraph Act. The allocation process has been marred by controversies in the past, with allegations of corruption and unjust enrichment. These led Supreme Court to cancel all allocations, resulting in severe adverse economic impact on the economy.

Previously, the Comptroller and Auditor General of India (CAG) had also raised concerns about spectrum management, highlighting that uncertainty in availability of spectrum has caused delay in spectrum allocations.³⁵ Telcos had also raised concerns about rules creating pricing uncertainty for 5G auctions.³⁶

There is a need to practice an efficient, transparent and consistent method of spectrum allocation, design of which could be informed by findings and recommendations of the Ashok Chawla Committee on Allocation of Natural Resources.³⁷

³³ Effective Consumer Choice key for Indian TV Viewers: BIF-CUTS Survey, available at: <https://cuts-ccier.org/effective-consumer-choice-key-for-indian-tv-viewers-bif-cuts-survey/>

³⁴ Details available at: <https://r2accelerator.com/>

³⁵ CAG report highlights gaps in spectrum allocations, Down to Earth, available at: <https://www.downtoearth.org.in/news/science-technology/cag-report-highlights-gaps-in-spectrum-allocations-84009>

³⁶ Rules for 5G spectrum allocation create pricing uncertainty, Tech cos tell DoT, The Economic Times, available at: <https://economictimes.indiatimes.com/industry/telecom/telecom-news/rules-for-5g-spectrum-allocation-create-pricing-uncertainty-tech-cos-tell-dot/articleshow/92555852.cms>

³⁷ See: http://www.cuts-ccier.org/pdf/Report_of_the_Committee_on_Allocation_of_Natural_Resources.pdf

The sector and economy have also suffered previously owing to ambiguous definition of Adjusted Gross Revenue in the contract between government and the telcos.³⁸ While the DoT has recently amended the definition, there is a need to ensure that such situations do not arise in the future, by use of mutually agreeable terms in the contract, designed through stakeholder consultation, and consistent communication between government and relevant stakeholders. Institutionalisation of a forum to facilitate such engagement would be important.

A level playing field for public and private sector telcos is also essential for sustainability of the sector. The government recently pushed its public sector undertaking, the Bharat Sanchar Nigam Ltd (BSNL), to improve performance.³⁹ Use of appropriate incentives and disincentives would be crucial in this regard.

Previous experience shows that fierce competition led to many telcos being driven out of the market. While consumer welfare enhanced in terms of low-priced services being offered, such consolidation has now led to lesser choices being available with the consumers and prices have recently been again risen by telcos.

With respect to upcoming telecom technologies such as 5G and 6G, telcos are likely to generate a large share of the revenue from the private captive networks.⁴⁰ If private captive networks are allowed for private use, it may significantly impact the revenue shares of telcos.⁴¹ These factors need to be taken into account while spectrum auction and licensing, so that telcos don't suffer revenue losses which drives them out of the market. The government should assess the situation of the market, including the paying capacity of telcos.⁴² Thus, there may be merit in mandating a market study before conducting auctions within the legal framework. Further, constant review of market developments and impact of regulations may be institutionalised through sunset provisions and periodic reports.

- *Right of Way (Paras 18-20)*

The consultation paper states that RoW should be obtained in a uniform and non-discriminatory manner for telecom infrastructure. Earlier, TRAI had stated that several state governments continue to operate with their own rules for granting RoW permissions and others, even when have made changes to their RoW policy have not implemented them. These challenges impact overall broadband penetration.⁴³ By bringing in the Indian Telegraph Right of Way

³⁸ DoT amends AGR definition to remove non-core items, The Economic Times, available at: <https://telecom.economictimes.indiatimes.com/news/dot-amends-agr-definition-to-remove-non-core-items/87263819>

³⁹ Ashwini Vaishnaw to BSNL: Customer is God, solve problems immediately, The Economic Times, available at: <https://telecom.economictimes.indiatimes.com/news/ashwini-vaishnaw-to-bsnl-staff-focus-on-your-customers/93519476>

⁴⁰ 5G, competitiveness, and growth, Financial Express, available at: <https://www.financialexpress.com/opinion/5g-competitiveness-and-growth/2608597/>

⁴¹ 5G rollout unviable if captive private networks allowed, telcos tell govt, Business Standard, available at: https://www.business-standard.com/article/economy-policy/5g-rollout-unviable-if-captive-private-networks-allowed-telcos-tell-govt-122060900252_1.html

⁴² “With only a 35 percent reduction in pricing, TRAI fails in recognising the paying capacity of telcos”, Pradeep S Mehta, CUTS International, available at: <https://cuts-ccier.org/with-only-a-35-percent-reduction-in-pricing-traifails-in-recognising-the-paying-capacity-of-telcos-pradeep-s-mehta-cuts-international/>

⁴³ Recommendations on Roadmap to Promote Broadband Connectivity and Enhanced Broadband Speed, TRAI, available at: https://www.trai.gov.in/sites/default/files/Recommendations_31082021.pdf

(Amendment) Rules, 2022⁴⁴, the government has allowed telcos to enter into agreement with private property owners to lay cables without taking permission from the authorities.⁴⁵ Further, the GatiShakti Sanchar Portal launched by the DoT streamline the RoW application process across the country.⁴⁶ These reforms will help in faster roll out of 5G services across the country. This should be carried forward in the new legal framework. However, it must be ensured that adequate compensation and restitution in terms of other comforts are provided to citizens giving up their property by telcos.

Earlier, TRAI had recommended waiving off RoW charges for five years, from 2022-23 to 2027-28 for speedy laying of common ducts and posts.⁴⁷ As per the recommendation, DoT will have to coordinate with state governments, for this purpose. Accordingly, there may be merit in exploring ways in which deliberations between the central and state governments can be done within the new legal framework.

- *Framework for Mergers, Acquisitions etc. (Para 21)*

The TRAI had given ‘Recommendations on Reforming the Guidelines for Transfer/ Merger of Telecom Licenses’ in 2020,⁴⁸ to the Department of Telecommunications (DoT), with respect to the Guidelines for Mergers & Acquisitions, 2014. However, experts opined that the recommendations were too little too late, given that the telecom sector is today left with just three major private players, leaving little scope for Mergers and acquisitions (M&A).⁴⁹ Accordingly, more clarity remains to be given on whether there is a need for revisiting the framework for M&A in the telecom sector at this stage.

Also, given that the recommendations aimed at curbing anti-competitive issues, which may arise out of M&A in the sector, it is imperative for any proposed law on the subject, to be harmonised with the Competition Act. This becomes especially important considering the introduction of the competition amendment bill in parliament,⁵⁰ and the Report of the Expert Committee on Company Law which also dealt with M&A issues.⁵¹ Furthermore, as noted

⁴⁴ Indian Telegraph Right of Way Amendment Rules, 2022, Department of Telecom, available at: <https://dot.gov.in/actrules/indian-telegraph-right-way-amendment-rules-2022>

⁴⁵ DoT amends Right of Way Rules; to aid faster 5G roll-out, The Hindu, available at: <https://www.thehindu.com/business/Economy/dot-amends-right-of-way-rules-to-aid-faster-5g-roll-out/article65811181.ece>; 5G service will be available in most part of the country in 2-3 years: Ashwini Vaishnaw, The Times of India, available at: <https://timesofindia.indiatimes.com/business/india-business/5g-service-will-be-available-in-most-part-of-the-country-in-2-3-years-ashwini-vaishnaw/articleshow/93783342.cms>

⁴⁶ Gati-Shakti Vision for Telecom Infrastructure – Right of Way Rules Amended for Faster 5G Roll-out, Press Information Bureau, available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1854472>

⁴⁷ Trai's suggestion to waive RoW charges to reduce network rollout cost: COAI, Business Standard, available at: https://www.business-standard.com/article/economy-policy/trai-s-suggestion-to-waive-row-charges-to-reduce-network-rollout-cost-coai-121090601117_1.html

⁴⁸ Recommendations on Reforming the Guidelines for Transfer/Merger of Telecom Licenses, TRAI, available at: https://www.trai.gov.in/sites/default/files/Recommendation_21022020.pdf

⁴⁹ Trai proposal puts liability burden on sellers in telecom M&A deals, Business Standard, available at: https://www.business-standard.com/article/economy-policy/trai-moots-market-share-math-for-mobile-and-internet-service-providers-120022200002_1.html

⁵⁰ Over Rs 2,000-cr M&As may come under Competition Commission's purview, Business Standard, available at: https://www.business-standard.com/article/companies/over-rs-2-000-cr-of-m-as-may-come-under-competition-commission-s-purview-122080401489_1.html

⁵¹ Report Of the Expert Committee on Company Law, Ministry of Corporate Affairs, available at: <http://reports.mca.gov.in/MinistryV2/mergers+and+acquisitions.html>

above, the sector regulator - TRAI, as well as the DoT will need to work closely with the market regulator - CCI on competition issues in the sector, and consider its findings from its market study on the telecom sector in India, conducted in 2021.⁵² Mandating consultation, and creating a forum for cooperation would be useful in this regard.

- Provisions pertaining to Insolvency (Para 22)

Similar to jurisdiction issues between the TRAI and the CCI on competition aspects, another issue requiring further study is whether Guideline 11 of ‘Guidelines for Access Spectrum Trading for Access Service Providers’,⁵³ can override provisions of the Insolvency and Bankruptcy Code, 2016 (‘IBC’). Notably, the National Company Law Appellate Tribunal (NCLAT) feels so, and has stated that the DoT must be paid all its past license dues, if the licenses are to be transferred under the IBC.⁵⁴ The NCLAT, in its order in the case of Union of India v. Vijaykumar V Iyer,⁵⁵ ensured that such operational dues to the DoT are cleared in preference to all other financial and operational creditors, arguably creating a new class of ‘preferred’ operational creditors. Experts opine this to be contrary to the IBC, which treats the DoT, or any other government licensor of land, mineral rights, intellectual property etc. as any other operational creditor.⁵⁶

Accordingly, there is a need for deep diving on the subject, and give due attention to answering the following questions – Are Spectrum Trading Guidelines overridden by Section 238 of the IBC;⁵⁷ and is there a need to treat DoT as a special class of ‘operational creditors’? and does the same need to be put in law?

- Penalties (Para 25)

The TRAI had been requesting the DoT to grant it powers to levy penalties upto INR 10 crores on telcos, and impose jail term upto 2 years on telecom executives, via an amendment in

⁵² Market Study on the Telecom Sector in India, Competition Commission of India, available at: <https://dipa.co.in/reports/CCI%20Report%20-%20Market-Study%20on%20the%20Telecom%20Sector-In-India.pdf>

⁵³ The seller shall clear all its dues prior to concluding any agreement for spectrum trading. Thereafter, any dues recoverable up to the effective date of trade shall be the liability of the buyer. The government shall, at its discretion, be entitled to recover the amount, if any, found recoverable subsequent to the effective date the trade, which was not known to the parties at the time of the effective date of trade, from the buyer or seller, jointly or severally. The demands, if any, relating to licenses of seller, stayed by the Court of Law, shall be subject to outcome of decision of such litigation. Guidelines for Trading of Access Spectrum by Access Service, TRAI, available at: https://dot.gov.in/sites/default/files/2015_10_13%20Trading-WPC_0.pdf

⁵⁴ NCLAT disposes of DoT petition against Videocon resolution plan, The Economic Times, available at: <https://telecom.economictimes.indiatimes.com/news/nclat-disposes-of-dot-petition-against-videocon-resolution-plan/88844711>; and How will you recover AGR dues from telecom companies facing insolvency, SC asks DoT, The Print, available at: <https://theprint.in/judiciary/how-will-you-recover-agr-dues-from-telecom-companies-facing-insolvency-sc-asks-dot/479012/>

⁵⁵ Union of India v. Vijaykumar V Iyer, Judgment dated 13 April 2021 in CA (AT) (Ins.) No. 1410/2019

⁵⁶ License dues trump the Insolvency and Bankruptcy Code? Lakshmi Sri, available at: <https://www.lakshmisri.com/insights/articles/license-dues-trump-the-insolvency-and-bankruptcy-code/#>

⁵⁷ The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. The Insolvency and Bankruptcy Code, Ministry of Corporate Affairs, available at: <https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

Section 29 of the TRAI Act 1997.⁵⁸ Notably, the DoT had even sought a legal opinion on whether the regulator can function as a civil court, or be at power with other regulators like the CCI. While the issue has been pending for determination for many years, more recently, the regulator has changed its stance and considers the current provisions/ powers to be adequate.⁵⁹ Notably, the central and state governments have shown intent on reducing criminal provisions in different laws.⁶⁰ Examples include: The Companies Act 2013, The Limited Liability Partnership Act, 2008, among others.⁶¹ Therefore, granting powers to TRAI to impose jail term must be viewed with extreme caution.

Accordingly, while the paper has called for penalties to be proportionate to offences, and proposes to consolidate and update the various provisions on penalties and offences, the issue on the TRAI's powers in this regard requires focussed deliberations and a CBA, to formulate a way forward. Furthermore, the new legal framework may also include provisions for providing restitution to consumers who have lost out, and disgorgement of unlawful gains on private players.

- *Public Safety and national security (Para 26)*

Situations of public emergency, public safety and interests of national security while being important,⁶² must be addressed through measures which achieve the objectives in the least intrusive and restrictive manner. Having clear definitions and well-defined scope of these issues is also much needed.

While the paper has recognised the importance of telecom services for various sectors and applications, exercise of power to shut down the internet has been a practice used frequently by the government, vide the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017.⁶³ Notably, the United Nations Human Rights Council (UNHRC) had passed a resolution in 2016 condemning network disruptions and measures resorted by states to curb online access and/ or dissemination of information.⁶⁴ Most recently, a UNHRC report documented the 'dramatic real-life effects of Internet shutdowns on people's lives and

⁵⁸ TRAI seeks powers to penalise telecom companies which fail to meet regulations, The Economic Times, available at: <https://economictimes.indiatimes.com/news/economy/policy/trai-seeks-powers-to-penalise-telecom-companies-which-fail-to-meet-regulations/articleshow/52664684.cms>

⁵⁹ TRAI doesn't need penal powers to regulate telecom sector, Communications Today, available at: <https://www.communicationstoday.co.in/trai-doesnt-need-penal-powers-to-regulate-telecom-sector-chairman/>

⁶⁰ Making business easy: A template to ramp-up state capacity, Available at: https://economictimes.indiatimes.com/small-biz/sme-sector/making-business-easy-a-template-to-ramp-up-state-capacity/articleshow/83598085.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

⁶¹ Impact of Criminalising Provisions on Ease of Doing Digital Business in India, available at: <https://cuts-ccier.org/pdf/dp-impact-of-criminalising-provisions-on-ease-of-doing-digital-business-in-india.pdf>

⁶² Paragraph 26 of the paper.

⁶³ Suspension Rules, Department of Telecom, available at: <https://dot.gov.in/sites/default/files/Suspension%20Rules.pdf>

⁶⁴ U.N. passes landmark resolution condemning internet shutdowns, Access Now, available at: <https://www.accessnow.org/un-passes-resolution-condemning-internet-shutdowns/>

human rights'.⁶⁵ There is perhaps a need for reworking provisions related to internet shutdowns, in line with the observations of the UNHRC.

Further, the Standing Committee on Communications and Information Technology (IT) had given several recommendations in its recent report on shutdown of telecommunication and internet services in India.⁶⁶ These include appointment of a Review Committee which acts to perform the function of checks and balances as well as selective banning of services, among others. The new legal framework may incorporate such appropriate recommendations of the Standing Committee.

Another issue requiring attention is of the government's power to intercept/ access citizens data and communication, as also reaffirmed under the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021,⁶⁷ and the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009.⁶⁸ The importance of adopting principles of necessity, proportionality, and legality, as laid down by the Puttaswamy judgement,⁶⁹ cannot be overemphasised while exercising such powers. Incorporating this in the new telecom framework becomes more important, given that India currently lacks a personal data protection and privacy law. Upholding privacy intensive technologies like encryption also become imperative (as recognised by the TRAI as well, in its Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services 2020)⁷⁰.

Lastly, it is recommended that country revises its National Cyber Security Policy 2013,⁷¹ at the earliest, consultation on which had been initiated in 2020. This becomes crucial in light of emerging mobile communication technologies like 5G and 6G, which are poised to bring with them new age cyber-security challenges.

- Standards (Para 27)

⁶⁵ Internet shutdowns: UN report details 'dramatic' impact on people's lives and human rights, OHCHR, available at: <https://www.ohchr.org/en/press-releases/2022/06/internet-shutdowns-un-report-details-dramatic-impact-peoples-lives-and-human>

⁶⁶ Suspension of Telecom Services/Internet and its Impact, Standing Committee on Communication and IT, available at: http://164.100.47.193/Isscommittee/Communications%20and%20Information%20Technology/17_Communications_and_Information_Technology_26.pdf

⁶⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, available at: <https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf>

⁶⁸ Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules 2009, available at: <https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28Procedure%20and%20Safeguards%20for%20Interception%2C%20Monitoring%20and%20Decryption%20of%20Information%29%20Rules%2C%202009.pdf>

⁶⁹ Justice K.S. Puttaswamy (Retd) vs Union of India and Ors. on 24 August, 2017, available at: <https://indiankanoon.org/doc/91938676/>

⁷⁰ Recommendations on Regulatory Framework for Over-The-Top (OTT) Communication Services, TRAI, available at: https://www.traai.gov.in/sites/default/files/Recommendation_14092020_0.pdf

⁷¹ National Cyber Security Policy -2013, Ministry of Electronics and IT, available at: https://www.meity.gov.in/writereaddata/files/downloads/National_cyber_security_policy-2013%281%29.pdf

The paper has rightly acknowledged the need for having an enabling framework for setting appropriate standards for telecom equipment and services.⁷² However, the paper misses to mention that such standards must be in harmonisation with global standards/ practices. A recent example of the government pushing national standards, was seen in the case of 5G, wherein India pushed for its 5Gi technology to be incorporated as a national standard.

The Telecommunications Standards Development Society, India (TSDSI) had developed an indigenous 5G mobile communication technology. The technology was sent to the International Telecommunications Union (ITU) for evaluation, to be adopted as a standard. Notably, there was a lack of harmonisation between India's proposed standards, with the ones being finalised by the global Standard Setting Organisation (SSO), i.e., the 3rd Generation Partnership Project (3GPP), of which TSDSI is also a member.⁷³ The deviation risked the fragmentation of 5G technology, having the potential to lead to various unintended consequences:⁷⁴

- Delay in 5G technology being made available in India by nearly two years, since chipset makers will have to develop two variants of the same technology for complying with two sets of standards;
- Increase in costs of 5G enabled devices for Indian consumers, due to increase in costs of production (development, testing and implementation) of fragmented 5G technology;
- Deviation from global standards hampering interoperability;
- having India specific products/ services may reduce competition, and diminish follow-on innovation, which may adversely impact not only end consumers, but other users of 5G technology as well; and
- Isolation of India from Global Value Chains (GVCs).

The imperative of having harmonised/ collaborative standards, instead of national/ unilateral standards have been well documented.⁷⁵

Similarly, for telecom equipment, the government has proposed to mandate local hardware testing, which may have adverse implications on India's participation and contribution to GVCs, due to inadequate testing lab infrastructure and human resources, leading to delays and costs on the industry.⁷⁶ Consequently, stakeholders have raised concerns over implementing the Mandatory Testing and Certification of Telecom Equipment (MTCTE),⁷⁷ which requires all equipment to be tested at local labs before they can be installed in network rollout. There is

⁷² Paragraph 27 of the paper.

⁷³ A Middle Ground – 5Gi to Merge with Global 5G Standards, available at: <https://www.voicendata.com/middle-ground-5gi-merge-global-5g-standards/>

⁷⁴ Avoid fragmentation of 5G technology standards while bridging the digital divide, The Economic Times, available at: <https://telecom.economictimes.indiatimes.com/tele-talk/avoid-fragmentation-of-5g-technology-standards-while-bridging-the-digital-divide/4322>

⁷⁵ Standards Development and the 5G Opportunity – Mapping the way forward for India's telecommunications industry, CUTS International, available at: https://cuts-ccier.org/pdf/Report-Design_in_India_to_Maximize_5G_Opportunities.pdf

⁷⁶ Mandatory equipment check: Improper lab infra might delay telecom gear testing, Financial Express, available at: <https://www.financialexpress.com/industry/mandatory-equipment-check-improper-lab-infra-might-delay-telecom-gear-testing/2557386/>

⁷⁷ As given under the The Indian Telegraph (Amendment) Rules, 2017, Department of Telecom, available at: <https://dot.gov.in/sites/default/files/06Sept.pdf?download=1>

therefore a need for revisiting the MTCTE regime.⁷⁸ Notable recommendations in this regard would be mutual recognition of certification with different countries, and strengthening internal capacity.

4. The Way Forward

CUTS congratulates DoT for its forward thinking on deliberating the need for a new legal framework governing telecommunication in India. Given below are summarised recommended action points in this regard.

1. Ensure coherence of the new telecom framework with the NDCP, have a clear problem statement, ensure periodic reviews, conduct CBA before enacting provisions, and focus on implementation, transparency and accountability;
2. Ensure harmonisation of the new telecom regime with other laws such as those pertaining to insolvency and bankruptcy, mergers and acquisition, data protection, and other sector-specific regulations, through mandatory consultation between their regulators;
3. Raise awareness and build capacity of consumers, improve consumer grievance redress mechanism, and enable effective consumer choice, by partnering with credible consumers organisations, and mandating the industry to adopt of consumer broadband labels;
4. Simplify regulatory framework to ensure regulatory certainty to attract private sector investments;
5. Conduct market study before spectrum auction and licensing to evaluate the situation of the market;
6. Provide for enabling effective centre and state coordination on issues pertaining to RoW;
7. Revisit the framework for internet shutdowns in line with observations of the UNHRC, and recommendations of the standing committee on communications and IT, update the national cyber security policy, and bring in a personal data protection law; and
8. Ensure harmonisation between national and global mobile communication technology standards, revisit the MTCTE regime, and adopt three-step test of legality, necessity and proportionality before mandating government access to data.

CUTS looks forward to DoT considering the suggestions given above, and to assist DoT in its endeavour of developing a legal framework which is in tune with changing technology. For any clarifications/ further details, please feel free to contact Sidharth Narayan (sid@cuts.org), and/ or Prince Gupta (prg@cuts.org).

⁷⁸ Mandatory equipment check: Improper lab infra might delay telecom gear testing, Financial Express, available at: <https://www.financialexpress.com/industry/mandatory-equipment-check-improper-lab-infra-might-delay-telecom-gear-testing/2557386/>